IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE P.R.RAMAN
&
THE HONOURABLE MR. JUSTICE V.K.MOHANAN

WEDNESDAY, THE 10TH OCTOBER 2007 / 18TH ASWINA 1929

FAO.No. 179 of 2007()

CMA.42/2007 of VI ADDL.DISTRICT COURT, ERNAKULAM
OS.322/2004 of PRINCIPAL SUB COURT,ERNAKULAM
(IA.3127/2005 & 3162/2006)
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APPELLANT/PETITIONER/DEFENDANT:

THRESSIA, AGED 65,
W/O. VARGHESE, NERIAKKAL HOUSE,
CHERUMATTAPUZHAKKARA.

BY ADV. SRI.N.K.MOHANLAL

RESPONDENTS: RESPONDENTS/PLAINTIFF:

FRANCIS @ FRANKLIN, AGED 58 YEARS,
S/O. CHOOREPARAMBIL GEORGE, KALOOR, ERNAKULAM.

BY ADV. SRI.K.DIVAKARAN NAIR

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 01/10/2007, THE COURT ON 10/10/2007 PASSED THE FOLLOWING:

P.R.RAMAN &
V.K.MOHANAN, JJ.

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F.A.O. No.179 of 2007

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Dated this the 10th day of October, 2007.

JUDGMENT

Mohanan, J.

The appellant herein is the defendant and petitioner in I.A. No.3127/2005 and I.A. No.3162/2006 in O.S. No.322/2004 on the file of the Principal Sub Court, Ernakulam. I.A. No.3127/2006 is an application filed by the appellant/defendant to set aside exparte decree dated 30.7.2005 and I.A. No.3162/2006 is another petition filed for condonation of delay of 288 days in filing the petition for setting aside exparte decree in the above suit. By a common order dated 19.2.2007 the court below dismissed the above petitions and the said order is impugned in this appeal.

2. The suit was for specific performance of an agreement. The appellant herein who is the defendant is aged about 65 and according to her, she is residing in the property in question and she has no other property. It is borne out from records that the appellant-defendant entered appearance and filed a written statement on 10.8.2004 and based upon the pleadings of the parties, the trial court has framed nine issues and the case was listed for trial on 14.7.2005 and on that date case was adjourned to 27.7.2005 as there

was no sitting on 14.7.2005 which was declared as a holiday. On the adjourned date for trial of the suit, the defendant's counsel prayed for an adjournment, but the same was disallowed and the defendant was set exparte. On 27.7.2005 the plaintiff appeared before the court and filed proof affidavit of chief examination and Exts.A1 to A6 were marked and accordingly on 30.7.2005 the judgment and decree was passed exparte. Thereafter the appellant-defendant filed I.A. 2236/2006 on 15.6.2006 to set aside the exparte decree. The appellant-petitioner who was examined as PW1 in the proof affidavit stated that her counsel attempted to contact her, but she did not receive any communication. According to her, son-in-law Vinod, who had contacted the counsel, was not available in the station at that time and therefore, she was not aware of the fate of the case. It is also borne out from the record that the respondent herein, the plaintiff filed I.A. No.419/2006 on 19.1.2006 and the appellant-defendant received notice in that petition, but the same was also set exparte on 4.4.2006. The explanation given for her non-appearance is that the clerk of her counsel left the office and therefore, the case bundle could not be traced out and thus the present applications were filed belatedly. On the other hand, the plaintiff-respondent pointed out in I.A. No.419/2006 that the petitioner-appellant filed I.A. 2236/2006 on 24.5.2006, but the present petition was filed only on

15.6.2006. Thus the court came into conclusion that the present petition was filed only on 15.6.2006 and the petitioner failed to explain her failure to file the petition to set aside exparte decree when she filed I.A. 2236/2006 in I.A. No.419/2006. On the strength of the decisions reported in 1998(1) KLT 1008 (PLANTATION CORPORATION LTD. V. HUSSAIN) and in 2001(6) SCC 176 (N.K.PRASAD V. P.ARUMUGHAM), the defendant prayed for allowing those petitions. The above prayer was strongly resisted by the plaintiff-respondent saying that the defendant-petitioner was negligent and no sufficient explanation was forthcoming to condone the delay of 288 days. It was also argued that the decisions cited by the appellant-petitioner are not applicable considering the facts and circumstances involved in the present case. During the time of hearing of the above interlocutory applications, the court below has formulated two points for consideration as to whether the petitioner-defendant has explained the delay in filing the petition to set aside the exparte decree and also whether the petitions are allowable. The memorandum of evidence in those I.As. consist of the oral deposition of PW1, the defendant and Exts.A1 and A2. After consideration and evaluation of the evidence on record, the court below came into the conclusion that the appellant-petitioner failed to satisfactorily explain the delay in filing I.A. No.3127/2006 and accordingly

both the petitions were dismissed.

3. We have heard counsel for the appellant as well as counsel for the respondent.

4. Learned counsel appearing for the appellant argued that it was the son-in-law one Mr.Vinod who used to contact the counsel for the appellant and he was not in station and therefore, the appellant came to know about the exparte decree on at a later stage when she received notice on the execution proceedings. He had submitted that the letter and telegrams sent by the counsel intimating the listing of the case were not received by the appellant and therefore, she could not attend the case on the appointed day. Counsel for the appellant pointed out that the appellant is a widow aged 65 and she has no property other than the property in question and therefore, the court below ought to have allowed those petitions and to have a judgment and decree on merits. Placing much reliance in the abovereferred decision reported in 1998(1) KLT 1008 counsel argued that even if the explanation offered by the appellant-petitioner to condone the day was not satisfied, the application could have been allowed on terms. It is also argued that in view of the abovereferred decision reported in 2001(6) SCC 176, the court should have allowed the application on cost considering the peculiar facts and circumstances involved in the case.

5. On the other hand, learned counsel appearing for the respondent-plaintiff on the strength of the dictum laid down by the Honourable Apex Court in the decision in ILA VIPIN PANDYA(2) V. SMITA AMBALAL PATEL reported in (2007) 6 SCC 750 contended that prayer for setting aside exparte decree cannot be entertained as usual course and no such prayer can be granted in favour of parties who consider the court proceedings in a perfunctory manner and in such case exemplary cost should be awarded. The learned counsel further argued that there was sheer latches and negligence on the part of the appellant-petitioner and because of the above callous indifference, the court adopted all legal formalities and in pursuance of such proceedings he had paid the balance consideration of Rs.1 lakh on 19.1.2006 and purchased stamp paper for Rs.20,000/- for preparing the sale deed. Thus the sum and substance of the submission of learned counsel for the respondent-plaintiff is that but for the court proceedings, due to the latches on the part of the appellant, the plaintiff-respondent was constrained to deposit the balance sale consideration and incurred heavy expenditure for getting the sale deed executed towards the enforcement of the decree and at the fag end the appellant-petitioner clandestinely filed petition to set aside the exparte decree instead of filing an appeal. Therefore, according to the counsel for the respondent, the

appeal deserves no consideration and the same is liable to be dismissed.

6. It is an undisputed fact that the appellant-defendant who is the petitioner is an aged widow and she has no other property and if the petitions are not allowed, she will be put in irreparable injury and hardship as a consequence of the exparte decree which was not on merits. It is true that the explanation offered by the appellant for condoning the delay of 288 days is not satisfactory. However, considering the fact that the appellant-petitioner is an aged widow, one can assume that she was not in a position to defend the suit as that of a vigilant litigant.

7. It is also brought to our notice that the appellant herein before approaching this court had approached the District Court, Ernakulam by filing C.M.A. No.42/2006 challenging the impugned orders of the trial court. By judgment dated 5.6.2007, the District Court has dismissed the above appeal as the same was not maintainable. The above fact would show that the appellant/defendant is very much aggrieved by the impugned orders of the court below and she was pursuing her remedy one after another and anxiously pursuing the legal remedies to redress her grievance. Even though there was default on the part of the appellant-petitioner in defending the suit effectively and properly and even though there was delay in filing the petition for setting aside expart decree, it can be seen that the

judgment and decree are not on merits and therefore, the interest of justice requires to give an opportunity to the appellant to place her case before the court below and to have judgment and decree on merits, otherwise the net result would be an aged widow will be thrown out from her sole property.

8. But it is pertinent to note that because of the default on the side of the appellant-petitioner, the court proceeded in accordance with the procedure laid down by law and passed a decree and as a result of which towards realisation of the decree, the respondent-plaintiff has deposited the balance consideration of Rs.1 lakh on 19.1.2006 and he had incurred Rs.20,000/- for purchasing the stamp paper for preparing the sale deed and other expenses and those aspect should not have been taken note of. Hence it is only just and proper to allow this appeal and the petitions on terms. Therefore, we are of the opinion that the delay of 288 days in filing the petition for setting aside exparte decree can be allowed on condition that the appellant-petitioner pay a sum of rupees seven thousand and five hundred to the respondent-plaintiff and to have a verdict on merit for the ends of justice.

9. In the light of the above facts and circumstances of the case, we allow this appeal and set aside the exparte decree dated 30.7.2005 and impugned order dated 19.2.2007 in I.A. Nos.3127/2006 and 3162/2006 in

O.S. No.322/2004 on the file of the Sub Court, Erakulam on condition that the appellant-petitioner shall pay a sum of rupees seven thousand and five hundred to the respondent-plaintiff within fifteen days from the date of this judgment and on filing a Memo to that effect within another fifteen days before the court below and on such event, the Sub Court, Ernakulam is directed to restore the above suit on file and dispose of the same on merit in accordance with law and on default, the Appeal will stand dismissed.

P.R.RAMAN
Judge

V.K.MOHANAN
Judge

pms